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DECISION



Kojakowski
P.L. #1

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-189196

DATE: November 16, 1977

MATTER OF: Hepper Oil Company

DIGEST:

1. Protest against cancellation of solicitation filed just before expiration of what would have been 18-month contract period is academic and untimely under Bid Protest Procedures and Standards.
2. No objection is taken to using activity's request that procuring activity cancel certain items in solicitation before award in order to procure fuel oil from Indian-owned firm under Buy Indian Act (25 U.S.C. § 47 (1970)) since requirements were intended to be so procured and inadvertent administrative error caused inclusion of requirements in solicitation. Also, because of erroneous inclusion of requirements in solicitation, under procurement regulations, cancellation would be warranted.

By letter received on May 26, 1977, Hepper Oil Company protests the cancellation of invitations for bids (IFB) Nos. DSA600-76-B-1006 and DSA600-77-B-0006 issued by the Defense Fuel Supply Center (DFSC), Alexandria, Virginia.

IFB -1006 was issued on October 1, 1975. Bids were opened on November 11, 1975. The period of performance was January 1, 1976, through May 31, 1977. On February 4, 1976, the using activity, the Department of the Interior, Bureau of Indian Affairs (BIA), advised DFSC of its intent to award several of the requirements to the B&B Oil Company under the "Buy Indian Act," 25 U.S.C. § 47 (1970). In addition, BIA requested cancellation of various items already under contract and cancellation of items not yet awarded. DFSC refused to cancel ongoing contract items but withheld award of the other items. During the contract period which ended in May 1977 the items were locally purchased by the activity. Therefore, any questions under this solicitation are academic. Furthermore, the fact that this protest was not filed until just before the expiration of what would have been an 18-month contract term renders it untimely

under our Bid Protest Procedures and Standards. See 4 C.F.R. §§ 20.2(a) and 20.2(b)(2) (1977). The question of whether it is a compelling reason to cancel, after bids have been opened, in order to invoke the "Buy Indian Act" will be addressed below under the other protested solicitation.

Bids for 1,634 line items for various refined petroleum products were sought under IFB -0006. Bid opening was on February 7, 1977. The period of performance is June 1, 1977, through May 31, 1978. On February 21, 1977, DFSC received notice from the Department of Health, Education, and Welfare (HEW), Public Health Service (PHS), that certain items had been submitted in error and requested cancellation. Hepper was in line for award on three of the items on which PHS requested cancellation. Award has not been made. PHS indicated that the fuel oil will be procured from an Indian-owned firm under the "Buy Indian Act." The request of PHS to cancel states that the authority provided in the "Buy Indian Act" is also vested in the Secretary of Health, Education, and Welfare by virtue of various statutes and Reorganization Plans under which responsibility for maintaining and operating hospital and health facilities for Indians has been transferred to him. (Cf. 42 U.S.C. §§ 2001 and 202 (1970)).

Hepper challenges cancellation by PHS on the following grounds:

1. The Buy Indian Act requires that the purchase of Indian supplies over \$50 conform to the requirement for advertisement.
2. The authority provided in the "Buy Indian Act" is not vested in the Secretary of HEW by 42 U.S.C. §§ 2001 and 202 (1970) under which responsibility for maintaining and operating hospital and health facilities for Indians has been transferred.
3. It is not a compelling reason to reject a non-Indian's low bid for the sole purpose of making an award to an Indian firm.

Hepper's contention as to the \$50 limit is based upon a misreading of a historical note found in 25 U.S.C. 47 (1970). The "Buy Indian Act," as amended by the Act of May 18, 1916, ch. 125, 39 Stat. 126, states that insofar as advertising is required, it shall apply to the purchases or contracts in excess of \$50. However, where, in the discretion of the Secretary of the Interior, it is decided to purchase from Indian sources, the requirement for advertising does not exist. Furthermore, the "Buy Indian Act" provides:

"So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

With regard to Hepper's argument that the transfer of the maintenance and operation of hospital and health facilities for Indians to HEW did not include the authority of the "Buy Indian Act," we suggested to HEW in B-167841, December 18, 1969, that a definite policy be established for exercising the negotiating authority of the "Buy Indian Act" under similar circumstances to those existing in the present case. Here, the fuel oil appears to be earmarked for use at Indian hospital and health facilities. Further, the transfer language found in 42 U.S.C. § 2001 is not as limiting as Hepper contends. It reads:

"All functions, responsibilities, authorities, and duties of the Department of the Interior, the Bureau of Indian Affairs, Secretary of the Interior, and the Commissioner of Indian Affairs relating to the maintenance and operation of hospital and health facilities for Indians, and the conservation of the health of Indians, are transferred to, and shall be administered by, the Surgeon General of the United States Public Health Service, under the supervision and direction of the Secretary of Health, Education, and Welfare: * * *" (Emphasis supplied.)

Hepper relies on the following language in B-167841, supra, to support its position:


"It is clear that the above quoted statute [25 U.S.C. § 47 (1970)] involves a power, the use of which is discretionary with the Secretaries of the Interior and Health, Education, and Welfare. In the absence of clear abuse of such discretion their actions with respect to such power do not permit of a ruling in terms of strict legal rights and obligations. Where it has been determined not to employ the authority to negotiate, we believe that once bids are freely solicited without a 'Buy Indian' restriction expressly provided in the solicitation and such bids are opened, it would be detrimental to the integrity of the competitive bidding system, and therefore unauthorized, to reject a non-Indian's low

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bid for the sole purpose of making an award to an Indian firm. In our opinion the authority vested pursuant to the 'Buy Indian Act' may properly be exercised only where the restriction is clearly spelled out to prospective bidders prior to the submission of bids or offers. * * *

This case is distinguishable because HEW advises that the requirements had been intended to be purchased from Indian sources but were inadvertently forwarded to DFSC through administrative error as opposed to the situation in the cited case where there was no apparent error in soliciting the requirements. Under these circumstances, we do not believe objection should be taken to HEW's action. Also, because of the erroneous inclusion of these items in the solicitation, under procurement regulations, cancellation would be warranted. See Federal Procurement Regulations § 1-2.404-1 (1964 ed. circ. 1).

The protest is denied.


Deputy Comptroller General
of the United States